Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	

OPPOSITION OF SBC COMMUNICATIONS INC.
TO PETITION FOR CLARIFICATION OR RECONSIDERATION

SBC Communications Inc., on behalf of itself and its subsidiaries (collectively, "SBC"), hereby opposes the request of the Association for Local Telecommunications Services (ALTS), e.spire Communications, Inc. (e.spire), KMC Telecom, Inc. (KMC), McLeodUSA Telecommunications Services, Inc. (McLeod), and NuVox, Inc. (NuVox) (collectively, "Petitioners") that the Commission clarify, or reconsider, certain aspects of the Commission's *Collocation Remand Order* relating to cross-connects.[1]

Petitioners contend that the Commission's reliance on states to resolve cross-connect disputes in the first instance will undermine the utility of the Commission's cross-connect requirement, and therefore that the Commission must reconsider that portion of the *Collocation Remand Order*.[2] Petitioners further assert that the Commission must clarify precisely how cross-connect offerings are to be made available and priced by incumbent LECs. No such reconsideration or clarification is necessary.

[1] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, FCC 01-204 (rel. Aug. 8, 2001) (*Collocation Remand Order*).

[2] Petition at 3, quoting *Collocation Remand Order*, FCC 01-204 at para. 84.

I. Background.

In the *Collocation Remand Order*, the Commission concluded that, based on the D.C. Circuit's decision in *GTE v. FCC*, it could not require an incumbent local exchange carrier (LEC) to allow competitive LECs (CLECs) to provision cross-connects outside their physical collocation spaces.[3] Nevertheless, the Commission concluded that it can and should require incumbent LECs to provide cross-connects under sections 201 and 251(c)(6) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 201 and 251(c)(6).[4] Specifically, it required an incumbent LEC to make cross-connects available pursuant to section 201 as a "service" in connection with the incumbent's "existing special access services."[5] And recognizing that its authority under section 201 is limited to interstate and foreign communication by wire or radio,[6] the Commission required incumbent LECs to provide such a

[3] *Collocation Remand Order*, FCC 01-204 at para. 59, citing *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (*GTE v. FCC*). In *GTE v. FCC*, the D.C. Circuit concluded that the Commission's cross-connect requirement "imposes an obligation . . . that has no apparent basis in the statute." *GTE v. FCC*, 205 F.3d at 423.

[4] *Collocation Order*, FCC 01-204 at para. 59. For the reasons discussed in SBC's comments and reply comments, the Commission has no authority under section 251(c)(6), section 201, or any other provision of the Act, to require an incumbent LEC to provide cross-connects between collocated carriers. *See* Comments of SBC Communications Inc., CC Docket No. 98-147 at 22-26 (filed October 12, 2000); Reply Comments of SBC Communications Inc., CC Docket No. 98-147 at 23-28 (filed November 14, 2000). SBC therefore has appealed this and other requirements imposed by the *Collocation Remand Order*. This opposition to the pending petition for reconsideration is submitted without prejudice to SBC's appeal of the Collocation Remand Order or to any arguments that SBC may present in that appeal

[5] *See Id.* at para. 63 (concluding that incumbent LEC-provisioned cross-connects constitute a communications service necessary or desireable in the public interest); para. 68 (concluding Commission has authority to "compel carriers to make a cross-connect service generally available") 70, note 179 (requiring incumbent LECs to provide cross-connects "as a common carrier service"); and para. 73 (concluding cross-connects are "needed in connection with an incumbent LEC's existing special access services").

[6] *Id.* at para. 77. This limitation, of course, is mandated by the plain language of the Act. By its terms, section 201 applies only to common carriers "engaged in interstate and foreign communication by wire or radio" in their provision of "such communication service." 47 U.S.C. § 201(a). *See also* 47 U.S.C. § 201(b) (requiring, *inter alia*, that charges "in connection with such service [referring back to "interstate and foreign communication by wire or radio] shall be just and reasonable"); and 47 U.S.C. § 152(b)

cross-connect service only where a CLEC certifies that "more than 10 percent . . . of the traffic to be transmitted through the connection will be interstate."[7]

The Commission also required an incumbent LEC to provide cross-connects pursuant to section 251(c)(6), purportedly as part of the incumbent's duty to provide collocation on terms and conditions that are just, reasonable and nondiscriminatory.[8] Unlike the cross-connect requirement under section 201, the Commission determined that the cross-connect requirement under section 251(c)(6) does not depend on the presence of interstate traffic.[9] The Commission further stated that, as with other interconnection-related disputes, cross-connect disputes "can be addressed in the first instance at the state level."[10]

II. Cross-Connect Disputes Arising Under Section 251(c)(6) Are to Be Resolved At the State Level in the First Instance.

Petitioners claim that the Commission's reliance on states to resolve cross-connect disputes in the first instance will undermine the utility of the Commission's cross-connect

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("Except as provided in sections 223 through 227, inclusive, and section 332 . . . nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service . . .") (emphasis added).

[7] *Id.* at Appendix B-4, 47 C.F.R. § 51.323(h)(2); and at para. 78.

[8] *Id.* at paras. 79-83. As noted above, SBC believes that the Commission has no authority under section 251(c)(6) to require an incumbent LEC to provide cross-connects between collocated carriers, and agrees with Commissioner Martin that the Commission's decision to rely on section 251(c)(6) simply reflects "results-oriented decisionmaking." *See, id.*, Statement of Commissioner Kevin J. Martin, Approving in Part and Concurring in Part (further observing that "the Commission's . . . effort to tie cross-connects to section 251(c)(6) stretches the meaning of that provision too far. In doing so, the Commission ignores the D.C. Circuit, which has already rejected a virtually identical interpretation as 'unbridled agency action.'").

[9] *Id.*at para. 78, note 194.

[10] *Id.* at para. 84.

requirement.[11] In particular, Petitioners claim that relying on state regulators to interpret and enforce the cross-connect requirements adopted in the *Collocation Remand Order* will result in litigation, and a patchwork of inconsistent state positions — particularly with respect to rates for cross-connects.[12] Petitioners argue that, "[n]ow that the Commission has found that it is empowered to require cross-connects under Section 201 of the Act, it should not hesitate to use that authority to enforce the new rules in an efficient and consistent manner, using the resources of the Enforcement Bureau and the Competitive Pricing Division."[13]

In requesting the Commission to clarify that it (the Commission) will interpret and enforce both cross-connect requirements directly, Petitioners fail to recognize that, due to the different statutory basis for each requirement, the requirements are subject to different regulatory regimes. In so doing, they misconstrue the *Collocation Remand Order*, and the fundamental structure of the Act.

In the *Collocation Remand Order*, the Commission made clear that the cross-connects it required incumbent LECs to provide under section 201 were to be provided as an interstate access service regulated at the federal (not the state) level. In paragraph 63, for example, the Commission declared that incumbent LEC-provisioned cross-connects constitute a communications *service* necessary or desireable in the public interest within the meaning of section 201(a), which, the Commission observed, applies to "interstate or foreign communication by wire."[14] Likewise, at paragraph 70, the Commission stated that it was designating the

[11] Petition at 3.

[12] *Id.* at 4-5.

[13] *Id.* at 5.

[14] *Collocation Remand Order*, FCC 01-204 at para. 63.

provision of cross-connects as a common carrier *service* under section 201. *Id.* at para. 70, note 179.[15] And, at paragraph 73, the Commission clarified that the cross-connect requirement was to be provided "in connection with an incumbent LEC's existing special access services."[16]

In addition, consistent with the jurisdictional limits on its authority under section 201, the Commission required incumbent LECs to provide a cross-connect service under that section only where a CLEC certifies that "more than 10 percent . . . of the traffic to be transmitted through the connection will be interstate."[17] The Commission further made clear that disputes relating to a section 201 cross-connect were to be resolved at the federal level.[18] The *Collocation Remand Order* thus already makes clear that the cross-connect service required under section 201 is an interstate service regulated at the federal, not state, level; no further clarification is necessary.

In contrast, a cross-connect required under section 251(c)(6) must be implemented and enforced by the states in the first instance, with review by federal district courts. To be sure, the Commission has authority to adopt rules implementing sections 251 and 252 of the Act (including rules guiding state determinations regarding rates for, *inter alia*, interconnection and access to unbundled network elements).[19] However, under the language and structure of the Act, those rules, and indeed the requirements of sections 251 and 252 themselves, are not self-

[15] *Id.* at para. 75 (requiring incumbents to include dark fiber "as part of the cross-connect service" they were required to provide under section 201).

[16] *Id.* at para. 73 ("Therefore, our requirement to provide cross-connects between collocated competitive LECs is not burdensome; rather, it is a 'practice' needed in connection with an incumbent LEC's existing special access services to render the provisioning just and reasonable under section 201(b).").

[17] *Id.* at Appendix B-4, 47 C.F.R. § 51.323(h)(2); and at para. 78.

[18] *See id.* at para. 78 (stating that disputes over the accuracy of a CLEC certification that more than 10 percent of the traffic to be transmitted over a cross-connect will be interstate should be resolved through a section 208 complaint at the Commission.).

[19] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 729-33 (1999).

executing; they must be embodied and incorporated into an interconnection agreement to be effectuated.[20] If the parties cannot agree on all interconnection terms and conditions, state commissions may resolve the dispute through mediation or an arbitration process.[21] In the event of an arbitration, states must resolve disputed issues consistent with the requirements of sections 251 and 252, and the Commission's rules and orders. Importantly, however, the parties are free to negotiate voluntarily terms and conditions that do not meet the requirements of section 251(b) or (c). In fact, the section 252(a)(1) expressly so provides:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier *without regard to the standards set forth in subsections (b) and (c) of section 251*. 47 U.S.C. § 252(a)(1) (emphasis added).

The legislative history of section 252(a) reiterates the point: "Agreements arrived at voluntarily do not need to meet the requirements of new section 251(b) and (c)."[22]

The Act further makes clear that any dispute concerning an incumbent LEC's compliance with its obligations under section 251(c) is to be determined in the first instance through private negotiations and, if necessary, state commission mediations or arbitrations, with Federal district court (not Commission) review of such arbitrations.[23] The Act makes no provision for Commission intervention in this detailed process (except where a state fails to fulfill its

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[20] *See* 47 U.S.C. § 251(c)(1) (requiring carriers to negotiate in good faith in accordance with section 252 the particular terms and conditions of *agreements* to fulfill the requirements of section 251) (emphasis added).

[21] 47 U.S.C. § 252(a)(1), 252(b).

[22] Joint Manager's Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 125 (1996) (Joint Explanatory Statement.

[23] *See* 47 U.S.C. § 251(c)(1) (each ILEC has a "duty to negotiate in good faith in accordance with section 252 . . . the particular terms and conditions of agreements to fulfill the duties described in [section 251(b) and (c)]"); *id.* § 252(a)-(e) (setting out detailed procedures and standards for state commission arbitration of disputed terms and federal court review thereof).

responsibilities under section 252[24]) or for Commission review of state arbitration proceedings — whether directly or through a section 208 complaint alleging that a state-approved interconnection agreement violates sections 251 or 252 or the Commission's rules. Consequently, and consistent with its "practice in the past," the Commission correctly concluded that any disputes regarding the cross-connect requirement under section 251(c)(6) should be addressed in the first instance at the state level. As such, the Commission should reject Petitioners request to reconsider that conclusion.

III. Under the *Collocation Remand Order*, Only Cross-Connects Offered Under Section 201 Must Be Tariffed at the Federal Level.

Petitioners also ask the Commission to clarify that ILECs subject to the collocation rules are required to set forth the rates, terms and conditions for cross-connects in their federal tariffs.[25]

Once again, however, Petitioners fail to acknowledge that the cross-connect requirements established in the *Collocation Remand Order* are subject to different regulatory regimes. As discussed above, the cross-connect service that incumbent LECs are required to offer pursuant to section 201 is an interstate service subject to federal regulation (including the section 201 pricing rules for access services and section 203 tariffing requirements) by the Commission.[26]

In contrast, the cross-connects that incumbent LECs are required to offer pursuant to section 251(c)(6) are subject to regulation, implementation and enforcement at the state level through state commission arbitration, mediation, or approval of voluntarily negotiated

[24] 47 U.S.C. § 252(e)(5).

[25] Petition at 8.

[26] SBC notes that its incumbent LEC subsidiaries already offer a cross-connect service that is tariffed at the federal level, and priced consistent with the pricing standards established under section 201 of the Act.

interconnection agreements, with federal district court review of such state commission actions. And while the Commission has authority to establish rules regarding the pricing methodologies that states must use to implement the requirements of section 251(c), including collocation requirements under section 251(c)(6),[27] it does not have authority to determine the specific rates that incumbent LECs may charge. Section 252 of the Act commits that authority to the states, as part of their authority to arbitrate, mediate and approve interconnection agreements. 47 U.S.C. § 252. Consequently, the Commission cannot, consistent with the Act, require incumbent LECs to tariff cross-connects required under section 251(c)(6) at the federal level as petitioners suggest.

[27] SBC notes that, under the language and structure of the Act, the pricing standard for collocation in section 251(c)(6) is the same as that in section 201, and therefore that collocation should be priced using the same pricing principles the Commission long has applied under section 201, not the TELRIC methodology applicable to interconnection and unbundled network elements (UNEs). SBC recognizes that, in the *Local Competition Order*, the Commission concluded that collocation should be subject to the same pricing rules as interconnection and UNEs because "section 251(c)(6) requires that incumbent LECs provide physical collocation on 'rates, terms, and conditions that are just, reasonable, and nondiscriminatory,' which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3)." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15816, para. 629 (1996) (*Local Competition Order*). However, in reaching this conclusion, the Commission completely disregarded that subsections 251(c)(2) and (c)(3) both specifically provide that, in addition to being just, reasonable and nondiscriminatory, interconnection and access to UNEs must be priced in accordance with the requirements of section 252. In contrast, section 251(c)(6) simply requires that rates for collocation must be just, reasonable and nondiscriminatory (which is identical to the pricing standard in section 201 of the Act). And, it is based on its interpretation of section 252(d)(1) that the Commission required incumbent LECs to use the Commission's TELRIC methodology to price interconnection and UNEs. Plainly, if Congress had intended to apply the same pricing methodology to collocation, it would have said so. The fact that it did not demonstrates that Congress intended incumbent LECs only to provide collocation on rates that are just, reasonable and nondiscriminatory. It is no response to argue, as the Commission did in the *Local Competition Order*, that collocation should be subject to the same pricing rules because collocation is a method of obtaining interconnection or access to UNEs. *Id.* The simple answer is that, while collocation may be a means of obtaining interconnection or access to UNEs, it is *not* interconnection (which is defined in 47 C.F.R. § 51.5 as "the linking of two networks for the mutual exchange of traffic"), nor is it a network element. More importantly, if Congress had intended to price collocation the same as interconnection or access to UNEs, it would have done so. Consequently, the Commission's conclusion that collocation should be subject to the same pricing rules as interconnection and unbundled network elements is patently wrong and inconsistent with the language and structure of the Act.

IV. Conclusion.

For the foregoing reasons, the Commission should reject Petitioners' petition for clarification or reconsideration.

Respectfully submitted,

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